BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SHIRLEY HARDIMAN Claimant VS. **KELLOGG SNACK DIVISION** Respondent AND **OLD REPUBLIC INSURANCE CO.** Insurance Carrier	)	Docket No. **1,062,612**

ORDER

Respondent and its insurance carrier (respondent) and claimant request review of the January 30, 2013, preliminary hearing Order entered by Administrative Law Judge (ALJ) William G. Belden. Zachary A. Kolich, of Shawnee Mission, Kansas, appeared for claimant. James P. Wolf, of Kansas City, Kansas, appeared for respondent.

The record on appeal is the same as that considered by the ALJ and consists of the preliminary hearing transcript, with exhibits, dated January 23, 2013; the deposition of David Fiftal, with exhibits, dated December 21, 2012; the deposition of Phillip Park, dated December 21, 2012; the deposition of Dustin Knight, dated December 21, 2012; and all pleadings contained in the administrative file.

The ALJ found claimant did not violate the provisions of K.S.A. 2012 Supp. 44-501(a)(1)(C) and K.S.A. 2012 Supp. 44-501(a)(1)(D). Judge Belden awarded claimant medical treatment. Claimant's request for temporary total disability benefits (TTD) was denied.

ISSUES

Respondent contends the ALJ erred in not denying compensation pursuant to K.S.A. 2012 Supp. 44-501(a)(1)(C) and (D). Respondent requests that Judge Belden's October 25, 2012, Order be reversed.

Claimant argues the ALJ erred in denying claimant's request for TTD, but that the ALJ's Order should otherwise be affirmed.

The issues the Board must address are:

1. Does the Board have jurisdiction to review the January 30, 2013, preliminary hearing Order?

2. Should compensation be disallowed pursuant to K.S.A. 2012 Supp. 44-501(a)(1)(C) and/or (a)(1)(D)?

a. Did claimant willfully fail to use a reasonable and proper guard or protection voluntarily furnished to claimant by respondent?

b. Did claimant recklessly violate respondent's workplace safety rules or regulations?

3. Did the ALJ err in denying claimant's request for TTD.

FINDINGS OF FACT

After reviewing the evidentiary record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

The ALJ's preliminary hearing Order contains findings of fact which are detailed, accurate, and supported by the preponderance of the credible evidence. Those findings of fact are therefore adopted by the Board as though fully set forth in this Order.

PRINCIPLES OF LAW AND ANALYSIS

Although the Board has jurisdiction to review the defenses raised by respondent under K.S.A. 2012 Supp. 44-501(a)(1)(C) and K.S.A. 2012 Supp. 44-501(a)(1)(D),[1] the Board has no jurisdiction at this point in the claim to consider the issue raised by claimant that the ALJ erred in denying claimant's request for TTD. The ALJ did not exceed his authority in deciding whether or not claimant should be awarded TTD, nor does the TTD issue fit within the jurisdictional issues set forth in K.S.A. 2012 Supp. 44-534a(a)(2).

K.S.A. 2012 Supp. 44-501(a)(1) states in relevant part:

> Compensation for an injury shall be disallowed if such injury to the employee results from:

[1] K.S.A. 2012 Supp. 44-534a(a)(2), "whether certain defenses apply"; The term "certain defenses" in K.S.A. 44-534a refers to defenses subject to review by the Workers Compensation Board only if they dispute the compensability of the injury under the Workers Compensation Act. *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, Syl. 3, 994 1 P.2d 641 (1999).

(A) The employee's deliberate intention to cause such injury;

(B) the employee's willful failure to use a guard or protection against accident or injury which is required pursuant to any statute and provided for the employee;

(C) the employee's willful failure to use a reasonable and proper guard and protection voluntarily furnished the employee by the employer;

(D) the employee's reckless violation of their employer's workplace safety rules or regulations;

This section of the New Act amended the corresponding provisions in effect before May 15, 2011. A recent Board case, *Mahathey*,[2] contains a discussion of the term "reckless," as used in K.S.A. 2012 Supp. 44-501(a)(1)(D):

> "Reckless" is not defined by the Kansas Legislature in the Workers Compensation Act.
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> The definition of reckless in tort claims was discussed at length in *Hoard*.[3] The Kansas Supreme Court quoted Restatement (Second) of Torts § 500 comment a (1963), which states:
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> > "**Types of reckless conduct.** Recklessness may consist of either of two different types of conduct. In one the actor knows, or has reason to know . . . of facts which create a high degree of risk of physical harm to another, and deliberately proceeds to act, or to fail to act, in conscious disregard of, or indifference to, that risk. In the other the actor has such knowledge, or reason to know, of the facts, but does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so. An objective standard is applied to him, and he is held to the realization of the aggravated risk which a reasonable man in his place would have, although he does not himself have it.
> >
> > "For either type of reckless conduct, the actor must know, or have reason to know, the facts which create the risk. . . .
> >
> > "For either type of conduct, to be reckless it must be unreasonable; but to be reckless, it must be something more than negligent. It must not only be unreasonable, but it must involve a risk of harm to others substantially in excess of that necessary to make the conduct

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[2] *Mahathey v. American Cable & Telephone, LLC.*, 1,060,756, 2012 WL 5461478 (Kan. WCAB Oct. 8, 2012).

[3] *Hoard v. Shawnee Mission Medical Center,* 233 Kan. 267, 662 P.2d 1214 (1983).

> negligent. It must involve an easily perceptible danger of death or substantial physical harm, and the probability that it will so result must be substantially greater than is required for ordinary negligence."[4]

Until July 1, 2011, Kansas criminal law defined reckless conduct in K.S.A. 21-3201(c):

> Reckless conduct is conduct done under circumstances that show a realization of the imminence of danger to the person of another and a conscious and unjustifiable disregard of that danger. The terms "gross negligence," "culpable negligence," "wanton negligence" and "wantonness" are included within the term "recklessness" as used in this code.

The 2010 Legislature amended K.S.A. 21-3201 at L. 2010, ch. 136, sec. 13, effective July 1, 2011. K.S.A. 21-3201 is codified in K.S.A. 2011 Supp. 21-5202, which states in part:

> (j) A person acts "recklessly" or is "reckless," when such person consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.

Although the evidence is conflicting, the Board agrees with the ALJ's conclusion that claimant failed to follow the lock-out tag-out procedure for the machine on the 206 line. Claimant thereby violated respondent's safety rules and regulations. However, the Board cannot conclude, based on the evidence currently in the record, that claimant's violation constituted "reckless" or "willful" behavior. The defenses on which respondent relies are affirmative defenses and respondent accordingly has the burden of proving their applicability. The ALJ correctly concluded respondent did not sustain its burden of proof to establish the recklessness or willfulness that K.S.A. 2012 Supp. 44-501(a)(1)(C) and (D) require.

Under the *Mahathey* case, it is clear that recklessness contemplates something beyond ordinary negligence. To conclude claimant acted with the requisite recklessness, the preponderance of the credible evidence must support a conscious disregard of a known risk that exceeds negligence. Recklessness is akin to gross, culpable or wanton negligence.

As concluded by Judge Belden:

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[4] *Hoard* at 280-281.

> Claimant testified she did not act stubbornly or because she felt the rules did not apply to her. Claimant previously saw a coworker successfully work on the machinery without employing the lock-out tag-out procedure. Moreover, Claimant testified she acted the way she did in the spirit of problem-solving, not out of a spirit of disregard for a risk of injury. Claimant acknowledged to Mr. Park she made a mistake and was concerned about losing her job, which is not brazen or wanton behavior. Although Claimant's behavior was ill-advised, Respondent did not prove it rose to the level of wantonness contemplated by the statute. Accordingly, the Court concludes Respondent failed to prove by a greater weight of the evidence compensation should be barred for a reckless violation of Respondent's workplace safety rules or regulations.
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> In like token, the Court concludes the bar to compensability under K.S.A. 2011 Supp. 44-501(a)(1)(C) does not apply. That defense bars compensation if the injury was brought about by a willful failure to use a reasonable and proper guard and protection voluntarily furnished by the employer. As stated earlier, "willful" is a higher standard of culpability than "reckless." Because Claimant's behavior is not reckless, it cannot be found willful.[5]

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[6] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[7]

CONCLUSION

The Board has jurisdiction to consider the issues raised by respondent as “certain defenses” pursuant to K.S.A. 2012 Supp. 44-534a(a)(2).

Although claimant failed to comply with respondent’s safety procedure policy, including the lock-out tag-out procedure, respondent has not sustained its burden to prove that claimant’s safety violations were reckless or willful, as required by K.S.A. 2012 Supp. 44-501(a)(1)(C) and K.S.A. 2012 Supp. 44-501(a)(1)(D). Accordingly, respondent’s defenses based on the cited provisions of the New Act must fail.

The Board has no jurisdiction at this point in the claim to consider the issue of whether the ALJ erred in not awarding TTD. Claimant’s application for Board review is dismissed.

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[5] ALJ Order at 3-4.

[6] K.S.A. 44-534a.

[7] K.S.A. 2012 Supp. 44-555c(k).

WHEREFORE, the undersigned Board Member finds that the January 30, 2013, preliminary hearing Order entered by ALJ William G. Belden is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June, 2013.

_____
HONORABLE GARY R. TERRILL
BOARD MEMBER

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William G. Belden, ALJ